

California Regional Water Quality Control Board  
Santa Ana Region

September 6, 2002

ITEM: 5

SUBJECT: Agreement with Members of the Inland Empire Perchlorate  
Regulatory Task Force

DISCUSSION:

Recently, perchlorate has been found in a number of public water supply wells in and around the Cities of Colton, Fontana, and Rialto. Elevated levels of perchlorate have caused the shut down of wells operated by the Cities of Colton and Rialto, the West San Bernardino County Water District, and the Fontana Water Company. As a result of this serious water supply problem, those water agencies, Board staff, and other interested agencies have formed the Inland Empire Perchlorate Regulatory Task Force (Task Force) to investigate and remedy the perchlorate pollution of the affected groundwater basins.

The four affected water agencies have proposed to enter into an agreement with the Board to formalize this relationship. Board staff and the water agencies have negotiated such an agreement, and a copy is attached to this report. The proposed agreement would identify the roles of the Board and the water agencies, as well as specify certain aspects of the structure of the Task Force.

In addition, the agreement would establish a basis for future cost recovery by the parties. Pursuant to Water Code Section 13304(b)(4), the Board may contract with water agencies to perform investigations of groundwater pollution, and reimburse the water agencies for their costs from funds recovered through cost recovery actions. The agreement would establish such a relationship between the Board and the water agencies, so that the water agencies can assist the Board in the investigation of the perchlorate problem and be reimbursed in the future for their efforts.

RECOMMENDATION:

Executive Officer Thibeault has signed the proposed agreement, but the agreement specifies that it is subject to ratification by the Board. Staff recommends that the Board ratify the agreement as proposed.

**AGREEMENT BETWEEN**

**THE SANTA ANA REGIONAL WATER QUALITY CONTROL BOARD**

**AND**

**THE CITY OF RIALTO, THE CITY OF COLTON, THE WEST SAN BERNARDINO  
COUNTY WATER DISTRICT AND THE FONTANA WATER COMPANY**

**PURSUANT TO CALIFORNIA WATER CODE § 13304**

THIS AGREEMENT (“Agreement”) is made and entered into effective June 1, 2002 (“Effective Date”), by and between the CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SANTA ANA REGION (“Regional Board”), on the one hand, and the CITY OF RIALTO, the CITY OF COLTON, the WEST SAN BERNARDINO COUNTY WATER DISTRICT and the FONTANA WATER COMPANY (collectively referred to as the “Water Agencies”), on the other hand. At times, the Regional Board and the Water Agencies are collectively referred to as the “Parties” and the Regional Board and each of the Water Agencies is referred to individually as a “Party”.

### **RECITALS**

1. The Regional Board is charged, pursuant to California Water Code Sections 13000 et seq., with the coordination and control of water quality within a portion of San Bernardino County, California.

2. The Regional Board’s responsibilities include the prevention and abatement of water pollution and nuisance, the formulation of water quality control plans for areas within the region and enforcement of water quality and waste discharge requirements prescribed by the Regional Board.

3. Recently, the Water Agencies discovered the pollutant perchlorate in the groundwater basins in and around the Cities of Fontana, Rialto and Colton, California, including, but not limited to, the Rialto Basin, Colton Basin, Chino Basin and other basins (“Affected Basins”).

4. Beginning in 1997 and 1998, the City of Rialto, the City of Colton and the West San Bernardino County Water District collected samples of groundwater from their

municipal water supply wells in the Affected Basins. Laboratory analyses of the groundwater samples indicated that perchlorate was present in seven of the wells that were sampled. At that time, two wells exceeded California's Action Level ("AL") for perchlorate, which was 18 parts per billion ("ppb") (at concentrations of 273 ppb and 57 ppb). California now has an AL of 4 ppb for perchlorate. Eleven wells now exceed the AL, including one with concentrations in excess of 800 ppb. As a result, the Cities of Rialto and Colton and the West San Bernardino County Water District have shut down certain water production wells and/or serve water under restricted conditions.

Beginning in 1997, Fontana Water Company each year has collected samples of groundwater from all of its water supply wells in the Affected Basins for perchlorate testing. Laboratory analyses of the groundwater samples indicated that perchlorate was present in seven of the wells that were sampled. All seven of the wells exceed California's AL for perchlorate, and Fontana Water Company has been forced to shut down the wells and not use them except under restricted conditions.

**5.** Due to the significant threats to water quality, beneficial uses and the health and safety of the residents of the County of San Bernardino, the Regional Board has taken over as the lead agency overseeing the site assessment and remediation efforts related to the perchlorate pollution in the Affected Basins.

**6.** The investigations related to the perchlorate pollution will require both the Regional Board and the Water Agencies to incur significant costs. Specifically, the Regional Board and the Water Agencies will incur costs to: (i) investigate the scope and extent of the groundwater pollution; (ii) develop remedial action plans to abate and clean up the groundwater

pollution and restore the contaminated wells to full service; (iii) replace the impacted groundwater in order to provide water to customers; and, (iv) prosecute all responsible parties.

7. Due to the significant resource demands associated with this effort, the Regional Board has, pursuant to the California Water Code, formally requested the Water Agencies' assistance in responding to the perchlorate pollution of the Affected Basins.

8. Towards that end, the Regional Board has joined with the Water Agencies and established the Inland Empire Perchlorate Regulatory Task Force ("IEPR Task Force"). The purpose of the IEPR Task Force is to allow the Regional Board and the Water Agencies to perform investigations of the perchlorate pollution in the Affected Basins. A joint enforcement action is essential to develop an effective remedy and to fulfill the Regional Board's obligation to protect the water quality of the Affected Basins, and restore the Affected Basins' groundwater to beneficial use.

9. The purpose of this Agreement is to formalize the relationship between the Regional Board and the Water Agencies.

10. Pursuant to California Water Code Section 13304(b)(4), the Regional Board and the Water Agencies enter this Agreement to investigate the existing and threatened groundwater pollution of the Affected Basins. This Agreement will allow the Water Agencies, under the direction of the Regional Board, to perform the investigations of the groundwater pollution and initiate actions to recover costs incurred to investigate the pollution.

11. This Agreement between the Regional Board and the Water Agencies also will be used as the basis for tracking the IEPR Task Force's costs incurred in the groundwater pollution investigations, and to ensure that these costs are properly documented by all members of the IEPR Task Force.

## **AGREEMENT**

Accordingly, in consideration of the foregoing recitals, the promises contained herein, and for other good and valuable consideration, the Regional Board and the Water Agencies agree as follows:

**A. Specification of Regional Board's Authority and Instrumentalities.** This Agreement is formed under the authority of California Water Code Section 13304(b)(4) and the regulations adopted pursuant thereto, if any, which authorizes the Regional Board to contract with water agencies to perform, under the direction of the Regional Board, investigations of existing or threatened groundwater pollution or nuisance.

**B. Regional Board's Role.** The Regional Board is the lead enforcement agency overseeing the investigations of the perchlorate pollution in the Affected Basins. The Regional Board's activities related to the investigation into the potential sources of the pollution may include:

- (1) The issuance of subpoenas for production of documents to potentially responsible parties ("PRPs");
- (2) The issuance of deposition subpoenas to witnesses, PRPs, and other third parties who may have information relating to the perchlorate pollution;
- (3) The issuance of letters requesting documents pursuant to California Water Code Section 13267;
- (4) The issuance of cleanup and abatement orders to PRPs pursuant to California Water Code Section 13304;
- (5) The technical and legal review of data, information and documents relating to the perchlorate pollution;

- (6) Hearings before the Regional Board regarding the perchlorate pollution;
- (7) Coordination of the investigation with other enforcement agencies including the California Department of Health Services, the State Water Resources Control Board, the California Environmental Protection Agency's Department of Toxic Substances Control, the San Bernardino County District Attorney's Office and, if necessary, the United States Environmental Protection Agency;
- (8) Any other activities necessary to identify the sources of the pollution, and to identify the nature and extent of the perchlorate pollution; and,
- (9) Negotiations with all responsible parties to establish liability, reimbursement of costs, and an appropriate remediation plan to abate and clean up the perchlorate pollution.

**C. Water Agencies' Role.** The Water Agencies will assist the Regional Board in some or all of the activities described above in Paragraph B. Specifically, the Water Agencies may assist the Regional Board in the following areas:

- (1) The preparation and issuance of deposition subpoenas and subpoenas for production of documents;
- (2) The preparation and issuance of requests for production of information pursuant to California Water Code Section 13267;
- (3) Depositions of PRPs and other individuals who have information related to the perchlorate pollution. All depositions will be led by representatives for the Regional Board, and representatives for the Water Agencies will support Regional Board counsel at the depositions. Such support may

include attendance at the depositions, time allotted to depose witnesses, and review of materials produced by witnesses;

- (4) Review of data and information produced by PRPs and other third parties with information related to the perchlorate pollution;
- (5) Presentations to the Regional Board at any hearings held related to the perchlorate pollution;
- (6) Coordinating the activities of other enforcement agencies assisting in the investigation of the perchlorate pollution; and,
- (7) Negotiations with all responsible parties to establish liability, reimbursement of costs, and an appropriate remediation plan to clean up and abate the perchlorate pollution.

**D. Cost Documentation and Reimbursement Procedures.**

- (1) *The Regional Board's Cost Documentation Procedures:* The Regional Board will document its costs associated with the investigations of the perchlorate pollution in a manner consistent with standard Regional Board cost documentation procedures.
- (2) *The Water Agencies' Cost Documentation Procedures:* The Water Agencies shall:
  - a. Retain in a central repository all invoices associated with the investigation of the groundwater pollution of the Affected Basins;
  - b. At the request of the Regional Board, the Water Agencies shall provide copies of any invoices for costs incurred



related to the matters governed by this Agreement to the Regional Board; and,

- c. Provide the Regional Board with regular updates on the Water Agencies' costs incurred to: (i) investigate the sources of the perchlorate pollution; (ii) identify the parties responsible for the pollution; (iii) pursue legal action against the responsible parties; (iv) determine the scope and extent of the perchlorate pollution; (v) develop and implement a remediation plan to clean up the perchlorate pollution; and, (vi) perform other tasks associated with the investigation of the groundwater pollution (e.g., public outreach).

- (3) The Parties' costs shall be reimbursed from all funds (including fines and penalties to the extent allowed by law) from any Potentially Responsible Party or Entity in connection with the perchlorate or associated chemical pollution as follows:

- a. Any and all "Agreed Reimbursed Expenses" shall be paid in full first. Agreed Reimbursed Expenses are expenses which the Parties agree are necessary for the joint effort. The Parties hereby agree that copies of portions of the Administrative Record, in any form, constitute Agreed Reimbursed Expenses.

- b. Then, the Parties will be reimbursed in equal shares for all reimbursable costs. For example, if there are 5 Parties, each will be reimbursed 20% from all funds received.
- c. If a Party is reimbursed in full at any time, or withdraws from this Agreement, the remaining Parties will receive reimbursement in equal shares.

**E. IEPR Task Force Co-Chairpersons.** The IEPR Task Force shall have two Co-Chairpersons. One is to be designated by the Regional Board and the other is designated by the Water Agencies. Gerard Thibeault, Executive Officer has been designated the Regional Board's Co-Chairperson and Barry Groveman, Esq. of Musick, Peeler & Garrett LLP has been designated the Water Agencies' Co-Chairperson.

**F. IEPR Task Force Letterhead.** The IEPR Task Force shall maintain Letterhead for its Task Force correspondence. Only the Co-Chairpersons are authorized to use the Letterhead. All correspondence proposed to be issued on IEPR Task Force Letterhead shall be subject to approval of both Co-Chairpersons. No correspondence shall be issued on the Letterhead without both approvals.

**G. Regional Board Contact Persons.** Kurt Berchtold, Assistant Executive Officer of the Regional Board, and Jorge A. Leon, Senior Staff Counsel for the Regional Board, are the designated contact persons for the Regional Board. All communications from the Water Agencies to the Regional Board regarding the investigations of the perchlorate pollution shall be directed to both Mr. Berchtold and Mr. Leon.

**H. Water Agencies Contact Persons.** Barry C. Groveman and Steven J. Elie, of Musick, Peeler & Garrett LLP, counsel for the Water Agencies, are the designated contact

persons for the Water Agencies. All communications from the Regional Board to the Water Agencies regarding the investigations of the perchlorate pollution may be directed to Mr. Groveman or Mr. Elie.

**I. Integration Clause.** The Regional Board and the Water Agencies declare that this Agreement contains a total integration of all rights and obligations of both parties. There are no extrinsic conditions or collateral agreements or undertakings of any kind. It is the express intention of the Regional Board and the Water Agencies that any and all prior or contemporaneous agreements, promises, negotiations, or representations, either oral or written, relating to the subject matter and period of time governed by this document which are not expressly set forth herein, are to have no force, effect, or legal consequence of any kind.

**J. Headings.** The headings of paragraphs contained in this Agreement are for reference purposes only and shall not affect in any way its meaning or interpretation.

**K. Governing Authorities.** This Agreement shall be governed and construed in accordance with California Water Code Section 13304(b)(4) and all other applicable California laws and regulations according to their content on the effective date of this Agreement. Any provision of this Agreement in conflict with the laws or regulations referenced in this Agreement is hereby amended to conform to the provisions of those laws and regulations. Such amendment of the Agreement shall be effective on the effective date of the statute or regulation necessitating it, and shall be binding on the Parties, even though such amendment may not have been reduced to writing and formally agreed upon and executed by the Parties.

**L. Notice.** Any notice required to be given pursuant to the terms and provisions of the Agreement shall be in writing and shall be sent by certified mail, return receipt requested.

Notice to the Regional Board:

Jorge A. Leon, Esq., Counsel  
State Water Resources Control Board  
1001 I Street, 22nd Floor  
Sacramento, California 95814

Kurt Berchtold  
Assistant Executive Officer  
Santa Ana Regional Water Quality Control Board  
3737 Main Street, Suite 500  
Riverside, California 92501

Notice to the Water Agencies:

Barry C. Groveman, Esq.  
Steven J. Elie, Esq.  
Musick, Peeler & Garrett LLP  
One Wilshire Boulevard, Suite 2000  
Los Angeles, California 90017

**M.     Termination Without Cause.** Any Party may terminate this Agreement without cause in accordance with this paragraph. Termination without cause shall be effected by giving written notice of the termination to the other Parties. The termination of the agreement shall be effective on the date the notice of the termination is received. If one or more of the Water Agencies terminates this Agreement in accordance with this paragraph, the Agreement shall remain in effect as to all of the other Parties.

**N.     Application for Termination.** In the event that any provision of this Agreement is declared null and void by any court of law, either party may apply to the court for permission to immediately rescind the remainder of the Agreement.

**O.     Modification.** This Agreement shall not be modified by either party or by representations made before or after the execution of the Agreement. All modifications must be in writing and signed by the Parties.

**P.     Counterparts.**       This Agreement may be executed in multiple counter-parts, each of which shall be deemed an original Agreement, and all of which shall constitute one Agreement to be effective as of the Effective Date.

**Q.     Authority.**       Each of the Parties represents to the others that it has all requisite power to carry out its obligations under this Agreement, and that the execution, delivery and performance of this Agreement have been duly authorized by the governing body of each Party and/or that Party will, by no later than 120 days from the Effective Date, obtain such ratification. Unless such Party otherwise notifies the other Parties, such ratification will be deemed to have occurred.

*REMAINDER OF PAGE LEFT BLANK INTENTIONALLY*

###

**IN WITNESS WHEREOF**, the parties hereto executed this Agreement as of the  
Effective Date.

**WATER AGENCIES**

---

Bradley L. Baxter, Director of Public Works  
City of Rialto

---

Eric Fraser, P.E., Director of Water and Wastewater  
Colton Public Utilities  
City of Colton

---

A.W. “Butch” Araiza, General Manager  
West San Bernardino County Water District

---

Michael L. Whitehead, President  
Fontana Water Company

**REGIONAL BOARD**

---

Gerard J. Thibeault, Executive Officer  
Santa Ana Regional Water Quality Control Board